J. TONY SERRA #32639
CURTIS L. BRIGGS #284190
GREG M. BENTLEY #275923
506 Broadway
San Francisco CA 94133
Telephone: 415/986-5591

Attorneys for Defendant
KWOK CHEUNG CHOW

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. KWOK CHEUNG CHOW, aka RAYMOND CHOW, Defendant _____/	CR 14-196 CRB DEFENDANTS CHOW, NIEH, CHIU, SIU, PAU, AND YUN'S, REQUEST TO RESET *FRANKS* MOTION SUBMISSION AND HEARING DATES; MEMORANDUM IN SUPPORT Date: TBD Time: TBD Place:TBD

NOTICE AND MOTION

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS:

Defendants KWOK CHEUNG CHOW, GEORGE NIEH, ALAN CHIU, KEVIN SIU, JAMES PAU, AND LESLIE YUN, hereby request that the currently scheduled Franks motion submission date of May 28, 2015, and hearing date of July 7, 2015, be vacated and that the hearing date be converted to a status conference to consider the matters presented herein. A continuance of the contemplated Franks motion is required so that defense counsel can conduct further investigation under its obligations set forth in Strickland v. Washington due to the following conditions:

(1) While review of discovery is still in the initial stages, defendants' partial review has revealed significant discrepancies between FBI wiretap applications and the discovery produced to date;

2) The government has recently identified that audio evidence will not be made available to the defense due to a technical error by a government contractor requiring the defendants to request the original source material and/or inspection of the equipment used and methodologies employed in order to extract this discoverable evidence or conduct a forensic analysis to determine the contours of what may turn out to be the destruction of evidence;

3) Discovery indices were only recently provided to the defense which will likely prove invaluable in allowing the defense to thoroughly review the thousands of hours of audio and video which, to date, has been very difficult to discern and organize.

Defendants request that the currently scheduled hearing date of July 7, 2015, be converted to a status conference to determine the status of discovery requests and whether discovery motions are required before re-setting a Franks motion briefing schedule and hearing date.

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DATED: May 28, 2015

/s/ J. CURTIS BRIGGS
J. TONY SERRA
CURTIS BRIGGS
GREG BENTLEY
Attorneys for Defendant
KWOK CHEUNG CHOW

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MEMORANDUM OF POINTS AND AUTHORITIES

A. Procedural History

The previously scheduled Franks motion submission date was March 26, 2015. This Court granted a previously requested 60-day extension to the defense on April 3, 2015. (Docket #745.) The materials are voluminous: there is much to examine, with the information situated within over 9 million[1] files in discovery and, until recently, without indices to make it feasible to organize a cogent review. Through no fault of their own, defendants' attorneys have only reviewed a portion of the applicable discovery made available to them by the government, making the necessary investigation in preparation for Franks submissions far from complete.

Defendants sought a stipulation for a continuance from the United States. A productive informal-non-supervised discovery conference was held on May 19, 2015, where issues concerning the late produced, still missing, and disorganized discovery were addressed. The United States was agreeable to a continuance with all defendants but premised the stipulation on the condition that Raymond Chow would not bring about a challenge related to any issues already raised in Franks pleadings for Keith Jackson and Leland Yee previously filed with this Court.[2] The

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[1] This does not include the two most recent productions by the government. Total number of files

[2] Even though Chow remains joined in Yee and Jackson's motions, it was more practical for Chow to collaborate with defendants not in Trial Group One in identifying and briefing potential Franks issues. Chow's opportunity to be heard would be foreclosed if he relied solely on his joinder with Yee and

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government's condition was unacceptable to defendant Chow because he is presently engaged with all other defendants in evaluating Franks issues for consideration of an omnibus Franks motion to be presented jointly. This Court granted a CJA request to appoint counsel to draft a joint motion based on the collective review of those defendants who have standing to pursue a Franks motion.

Defendant Chow should not be required to bargain away his right to raise Franks issues independent of those raised by defendants Yee and Jackson in exchange for a stipulation to extend the Franks deadline; especially prior to conducting an adequate investigation of all wiretaps which list Chow as a target.

It was not Chow or his counsel who created the need for this renewed continuance. Rather, the inability to provide a cogent and useful guide to the voluminous discovery and to account for missing and/or destroyed discovery falls squarely on the government despite multiple instances of prior requests to release a table of contents for discovery. The government opposes this continuance.

B. While Review of Discovery Is Still in the Initial Stages, Defendants' Partial Review Has Revealed Significant Discrepancies Between FBI Wiretap Applications and the Discovery Produced to Date

The Supreme Court has stated that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v.

Jackson's motions under the proposed stipulation.

Washington, 104 S.Ct. 2052, 2066 (1984), "When evidence is equally available to both the defense and the prosecution, the defendant must bear the responsibility of failing to conduct a diligent investigation." United States v, Brown, 628 F.2d 471, 473 (5th Cir. 1980). Moreover, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Ibid.

Here, defendants counsel have deemed it critical to thoroughly investigate eight wiretap applications and one GPS application along with corresponding audio and video going back to 2008. The challenge for defendants is that the materials are voluminous: there is much to examine, with the information situated in over 9 million files in discovery and, until recently, without indices to make it feasible to organize a cogent review.

Defendants need a continuance to focus on body-wires. Many of the body-wires involve UCE 4599 who seemed to record most if not all his interactions with all subjects of this investigation. UCE 4599 would record from the time he left his FBI funded hotel or apartment to the time he returned, often eight or ten hours later. Those recordings involve hundreds, if not thousands, of interactions with hundreds of people about a variety of topics, a fraction of which were used to apply for wiretaps used to ultimately indict the defendants.

The defense counsel who have engaged in review of these body-wire recordings have reported that FBI wiretap applications

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involve, at minimum, significant misrepresentations. No attorney in the unassigned trial group has had sufficient time to reasonably investigate the recordings in their entirety and determine their relevance to Franks issues in order to present them to counsel assigned to draft the Franks motion.

During this cursory review of these audio recordings some alarming disparities have come to light which will require all defense counsel to examine audio and video more thoroughly than originally thought. Otherwise, presentation of an omnibus Franks motion will be ineffective.

One example of the types of misrepresentations made by UCE 4599 is instructive: when UCE 4599 recorded himself on his own body-wire in the restroom of a nightclub while on the phone, he misled another agent about a conversation UCE 4599 had just recorded previously that evening between himself and Raymond Chow. During the restroom conversation, UCE 4599 falsely explains to the caller on the phone that Chow has a source of supply of contraband in Mexico, that Chow is going to introduce UCE 4599 to that source of supply, and that the introduction is going to take place the next month. The conversation was as follows:

> "Buddy what's up. Hey dude, it's gonna be an all-star cast here. Yeah, andy [inaudible], let's see, [omitted], everybody's coming, so .... Yeah. Uh, just come now. Really quick, next month, introduction to a

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> Mexican source. Mexican, [source of supply][3]. Yeah, huge. Huge. Yeah. Yep. Yep. Oh, dude. Well it came up because it's like, you know, it came up because it's... he saw the envelope, you know what I'm saying? Yeah. Yep. Bro, you know what I'm saying? Yep. Ain't no lie dude, it's like, I didn't bring it up, you know he brought it up, you know. So. SB [Shrimpboy]. Yeah, yeah, yep, yep. I wanna introduce you to this guy. He said he runs the ports down in Mexico. Yep, mhm, yep, yep. Hey. Alright! Okay! That'll keep us going, yeah?"[4]

A review of the recorded conversation UCE 4599 was referring to reveals that Chow explicitly said he had never met anyone at the Port of Mexico and he was never involved in any of their activities. Furthermore, there is no suggestion that they are discussing illegal activities. In fact, Chow made it clear that the person who Chow offered to introduce to UCE 4599 (that had contacts at the Port of Mexico) was not a member of the Port itself and was characterized by Chow as a person who makes "honest mistakes." There was never a mention of Chow introducing UCE 4599 to anyone at the Port of Mexico or anyone anywhere in Mexico whatsoever. Not once was it arranged that

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[3] UCE 4599 used the term "S.O.S." which is commonly known in narcotics enforcement as an abbreviation for Source of Supply.

[4] Informal transcript and in no way adopted by the government, nor have they been given the opportunity to do so.

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any introduction would take place the following month.[5]

In no way did Chow say he could or would introduce UCE 4599 to a guy who runs the Port of Mexico. If the affiants presenting wire tap applications relied on UCE 4599's accounts and reports, which they indicated that they did, and UCE 4599 is demonstrated as willing to mislead another agent, then all of UCE 4599's recorded interactions need to be analyzed closely so that this Court may be provided accurate information in which to determine an omnibus Franks motion.

Other conversations and interactions involving cash payments to Chow by UCE 4599 were seriously misrepresented in wiretap applications. These will be addressed in the Franks motion, but in general it can be said that both Agents Pascua and Vanderporten painted a dramatically different picture of Chow's attitude toward taking any money and Chow's knowledge of criminal activity than what is borne out in some of the discovery reviewed to date.

On average Chow protested the cash gifts much more rigorously than reported, attempted to give the cash back multiple times, sounded dejected at being placed in the position to accept the gifts, and failed to exhibit any outward sign of knowledge of UCE 4599's supposed criminal behavior. Furthermore, the FBI boldly asserted in applications that all defendants were engaging "La Cosa Nostra." UCE 4599's cover name was David Jordan who posed as an American investment consultant with a

[5] Based on the portion of Bates around 1D151 at 01:56:30.

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business partner who was African-American, and another who was Asian-American. If UCE 4599 was supposed to be La Cosa Nostra no one informed the defendants of that contrary to what the wiretap applications suggest.

UCE 4599 recorded himself on numerous occasions planning to deceive Chow about the purported illegality of the cash payments in an effort to get him to acquiesce in accepting money by making Chow believe the payments were a lawful gratuity. This is never mentioned in the applications. Agent Vanderporten attests under penalty of perjury that Chow made "several exculpatory statements" throughout this investigation. The truth is that there are hundreds of exculpatory statements and acts reflected on the body-wires prior to government agents submitting the wiretap applications.

Given that a majority of defendants[6] interacted with UCE 4599 and it is those body-wire conversations with UCE 4599 that were used to support probable cause in at least the first two wiretap applications, all portions of body-wires must now be reviewed for information relevant to omissions and misrepresentations in the wiretap applications. Seemingly irrelevant time periods may have been reviewed much more quickly and with less attention than before this was discovered. The extent to which other conversations were misrepresented is a recent discovery and has caught nearly all defendants' attorneys

[6] All defendants are joined in this motion, however, Leland Yee and Keith Jackson have been assigned as the first trial group and although joined, their interactions were less with UCE 4599 than other UCE's.

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by surprise.

C. Defendants Require Access to Original Source Material and/or Equipment to Determine Whether Evidence is No Longer Available as the Government Represents and/or Why Evidence Was Not Preserved

The equipment installed in Nieh's car (Target Vehicle wiretaps one and two)consisted of two devices that were intercepting audio. One was an Audio Visual Line which could intercept both audio and visual material(Line AV). The other was capable of intercepting only audio (Line A). Therefor, the line sheets, were labeled "A" for the audio only line and "AV" for the audio visual line. The line sheets were prepared by agents who were listening (and viewing)to the interceptions and noted on the line sheets the identities of the participants and summarized the intercepted conversations. On October 30, 2014 the government informed defense counsel that the "listener prepared line-sheets for the line that had the best audibility of the two." The government has provided line-sheets for the two lines.

The defense review of the line-sheets of which there are hundreds, and which is only partially done, reveals that many of them are designated "AV" leading the defense to believe that the "AV" line is the one that is most audible.

The government notified the defense on or about May 18, 2015, that the recordings from the interior of defendant Nieh's vehicle cannot be accessed due to a technological error. The United States relied on and quoted heavily from these recorded conversations in their Affidavit in Support of Complaint in this

matter. These in-car recordings were relied on in multiple wiretap applications to varying degrees as well. Additionally, many defendants report a pattern of body-wire recordings which, according to UCE 4599, "malfunctioned" resulting in significant recording gaps in conversations which were critical in support of probable cause for all wiretaps in this investigation.[7]

Under Strickland, the defense has a duty to gain possession of recording equipment and original data files in an effort to extract Brady material from them. This is especially so given the nature of misrepresentations discovered so far. The defense has requested access to the recording equipment and original data files in order to attempt to extract this information currently unavailable to them. Depending on the outcome of that effort, the defense will potentially seek testing of the devices themselves in order to ascertain when and how the devices malfunctioned, when the malfunctioning should have been known to have occurred by government agents and whether there was indifference by the government to maintain the discovery.

These developments will take time for the defense to obtain appropriate court orders to facilitate extraction and testing. Now is the time to pursue this avenue of investigation for the

[7] The first sign of any criminality in Operation Whitesuit was years in when 4599 recruits a co-defendant during a government sponsored meal (with alcohol) believed to total more than a thousand dollars, where 4599 introduces the concept of money laundering for the first time in this investigation. He then recruits participants and attempts to install within the Chinese Freemasons a previously non-existent criminal enterprise. Several hours of this dinner conversation was not captured on the body-wire due to a "malfunction."

defense because if not permitted to do so before Franks submissions and hearing, then defendants will forfeit a substantial right and will dampen the effectiveness of a Franks challenge but the need to complete the same investigation will still be present for other stages of this litigation. The information that may be retrieved from forensic recovery and testing could be critical to determine how this potential evidence destruction occurred and what government agents knew or should have known to avoid or correct it.

The FBI applied for wiretaps which allowed them to secretly remove defendant Nieh's Mercedes, take it off-site, and install two audio lines, a video camera, and a GPS tracker. At one point the FBI reentered the car to repair an audio line that they were somehow aware then that it was malfunctioning. Of the two audio lines in the car, one of them cannot be retrieved by the FBI and defendants have been informed will not be retrieved for trial due to a technical problem; the other line seemed to have recorded nothing intelligible. The government represents that the malfunctioning of both audio lines had gone unnoticed until recently despite the surveillance teams and technical support unit's ability to determine one of the two lines was not working at one point during the operation. Furthermore, the wiretap applications and especially the initial Affidavit in Support of the Complaint quote these recordings heavily so it is unclear how this was accomplished without more recent access to the audio. The defense intends on testing the representation the audio is no longer accessible.

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There are other circumstances which suggest the audio files may be retrievable and/or they were retrieved already by the FBI. During a gap of more than a month between wiretaps in defendant Nieh's vehicle, government agents left the surveillance equipment in Nieh's car and, according to the follow up report, they evidently failed to notice the equipment was still recording.

Questions are raised as to how they would have discovered the unauthorized inadvertent eavesdropping without the ability to review the audio. It is possible the two wiretaps in question were the only ones intended to advance the goals of Operation Whitesuit which, as the dust settles, might mean they are of incredible significance.[8]

Being of considerable importance to defendant Nieh, his counsel is currently attempting to have the in-car audio enhanced Nieh and Chow's benefit. The government's theory of Chow's alleged knowledge and intent to operate a criminal enterprise is based on the conversations which were recorded in Nieh's car – conversations Chow adamantly insists were actually exculpatory. Chow's counsel has requested the equipment be preserved and turned over to the defense for forensic testing. This request has been denied by the United States. This is expected to be the subject of future litigation and will take

[8] What has been referred to by the government as the CKT Enterprise by the USA.

time to sort out.[9]

In a similar vein, UCE 4599 reports routine "equipment malfunctions" of two hours or more during time periods when the defense contends exculpatory conversations took place. Some of these occurred while UCE 4599 was drinking alcohol in large amounts and entertaining co-defendants. More than one co-defendant insists that the conversations which are the subject of these alleged malfunctions contained exculpatory information that would sharply contradict wiretap applications. This necessitates a more thorough investigation.

The defense requires more time to adequately investigate the audio and video in depth in order to present a meaningful Franks motion. Evidence already suggests that UCE 4599 has fabricated evidence that was used in wiretap applications where it is reported Chow whispered into 4599's ear in a loud karaoke bar, where it was too loud for the body-wire to detect it, that Chow knew of and approved all crime in San Francisco. Significantly, this is the only point in this five-plus year investigation where UCE 4599 made such a claim about what was purportedly captured on the body-wire that remains inaudible or that Chow whispered the alleged blatant inculpatory statement in his ear. Anything recorded or initially reported by UCE 4599 must be investigated closely for the purposes of the Franks motion as there is no reasonable justification for defense

[9] In United States v. Halgat, 2014 U.S. Dist. LEXIS 81612, the DEA was forced to turn over agent's cell phones for forensic evaluation in support of the defense of entrapment.

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counsel to fail to do so as commanded by Strickland.

As Strickland instructs, an attorney may conduct a preliminary investigation and determine that resources are better served on another line of defense. Conversely, an attorney may also decide that a particular line of defense warrants a greater amount of attention. Due to the significant findings already present, defendants deem investigation and review of wiretaps an area that warrants thorough attention as issues have surfaced (as documented herein) that must be addressed properly and as comprehensively as the Franks hearing will allow. For this reason a continuance is necessary.

D. The Defense Requires Additional Time to Take Advantage of Recently Produced Indices by the Government to Conduct a Meaningful Analysis of Voluminous Discovery

Defendants were only provided effective discovery indices on April 30, 2015. Defendants have been hampered in their ability to perform a meaningful discovery review without the knowledge of what makes up the contents of the voluminous discovery without an index categorizing the millions of discovery files contained with over one hundred thousand folders. The sheer volume of materials collected by the government in this RICO case with twenty-nine (29) named defendants is overwhelming.

Courts have recently recognized a need for the prosecution to do more than just turn over a file. The government should not be allowed to bury Brady material as an exculpatory needle in a haystack of discovery materials forcing defense counsel to divert enormous amounts of time, energy, and CJA funds to find

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it. See United States v. Skilling, 554 F.3d 529, 577 (5th Cir. 2009), aff'd in part and vacated in part on other grounds, 561 U.S. 358, 130 S.Ct. 2896 (2010) (suggesting that Brady violations related to voluminous open file discovery depend on "what the government does in addition to allowing access to a voluminous open file").

While defendants are appreciative of the government's effort to provide them indices so that they can navigate through the mountains of discovery, good cause for a continuance exists and is brought about by the state of discovery throughout the prior fourteen months leading up to this request. Defendants are in no way on an equal playing field when it comes to understanding what is contained in the discovery produced by the government. Defendants cannot be expected to move quickly through discovery that took the FBI and prosecution team more than fourteen months to process and produce. In fact, in a majority of pleadings and hearings in this case either this Court, the United States, or the defendants have commented on the enormity of the task of discovery.

Indeed, as the government has amply conceded: "The government anticipates that there are certain initial issues, such as discovery, suppression of evidence, *litigation of the wiretaps*, motions to dismiss, that most, if not all, of the defendants in this case will want to address ... the government submits that it makes good sense for the Court to defer any decisions on issues of severance and trial groupings until later in the case when the charges are finalized, *the discovery has*

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been digested, and it is determined which defendants will actually be proceeding to trial."[10] (Emphasis added)

Much can be learned about the challenges defendants face in identifying relevant portions of discovery by looking to the government's lack of enthusiasm for redacting documents in this massive body of discovery. The process of redaction is quite similar to the process of evaluating discovery in anticipation of a Franks hearing, especially when there is no road map or index to assist counsel on where to begin. First, one must gather all of the discovery into a central location, determine which files relate to a particular defendant, read, listen to, or watch the discovery to find out which portions may be relevant. Particular words or events must be marked once they are identified. Although defendants do not have the technological challenges of carving out audio and video segments for redaction, we have had a host of technological challenges that the government has not faced including having to have audio enhanced.

In the early stages of this case, the government argued against being forced to redact discovery in the context of moving for a protective order. They wrote: [p]arsing out and redacting the materials described above would be an enormous, time-consuming, and expensive task for the United States to undertake.[11]

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[10] Docket 175, Page 5, lines 18-23.

[11] Docket 279, Page 3, Lines 26-28.

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The Court sympathized with the government's position: "[g]iven the volume of sensitive material and the fact that it is so enmeshed with nonsensitive material, the protective order negotiated between the government and all of the other defendants in this case is both practical and appropriate. It enables the defendants to have nearly immediate access to the materials, which they may use immediately in the service of their defense."[12] The volume of sensitive material compared to the volume of information in discovery that pertains to our clients is obviously minimal which has amplified the burden placed on defense over the last fourteen months. Many of the defendants are barely able to begin utilizing discovery in defense of their client's as of the last few weeks.[13]

In addition to opposing redaction in an August 2014 hearing again related to the protective order, the government then acknowledged that defendants were struggling to wade through discovery and needed an index: "If anything, the fact that numerous defendants have asked for a guide or roadmap to discovery materials should be an indicator to the Court of the vast amount of discovery materials at issue in this case." The government thereafter provided a discovery index narrowing down the contents into categories of about one hundred (the one

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[12]Docket 301, Page 3, lines 9-13.

[13]Chow's counsel has been waiting ten months just to locate recordings of conversations used by the government in support of detention so that the detention issue could be readdressed because his counsel did not have the benefit of any discovery at that point. All recordings still have not been located.

recently produced is approximately thirteen times more specific). Unfortunately it was of little use because it was not specific.

Illustrating the present need for a continuance due to ongoing obstacles in discovery review, on November 12, 2014, defendants filed a Statement of Discovery specifically outlining and addressing that the defense was hindered by the way discovery was handled by the government. The defendants wrote: "the court should be aware that there is a lack of any discernable organizational structure in the discovery files as delivered by the Government to defense counsel. This substantially impairs the ability to prepare defenses, conduct investigation, and evaluate the merits of pretrial motions. This will continue to cause unnecessary delay unless remedial measures are taken."[14] The statement included the following precaution: "Until the discovery is adequately organized, either through disclosure of the Government's internal organization structure or by the discovery coordinator's completion of an index, the defendants run the risk of falling below Constitutional minimum guarantees." [15]

The defense coordinator could not complete an index until recently as well due to delays in the turning over of discovery. No response was given by the government to the identified need to assist defendants in locating discovery. No index or roadmap

[14] Docket 592, Page 1, Lines 22-28.

[15] *Id*. At Pages 4, Line 24, to Page 4, Line 2.

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was given in response to that statement.

On April 30, 2015, at the request of defense counsel, the United States finally agreed to provide a discovery index. The index has proved to be very helpful and it is appreciated. There are still issues with discovery but the United States and counsel for defendants seem to be working through those issues at this time. Over the course of the last month defendants counsel and staff have been moving through discovery as quickly as possible and have made significant progress but most of us are only in the beginning stages.

CONCLUSION

For the reasons set forth herein, moving defendants request that the July 7, 2015 hearing date on the Franks motion be converted to a status conference to address the discovery issues outlined herein, to set briefing schedules and hearing dates for any discovery motions that may be required and to reassess the filing deadline for the Franks motion and hearing date.

DATED: May 28, 2015

/s/ J. CURTIS BRIGGS
J. TONY SERRA
CURTIS BRIGGS
GREG BENTLEY
Attorneys for Defendant
KWOK CHEUNG CHOW

LAW OFFICES
506 BROADWAY
SAN FRANCISCO